True Donative Freedom: Using Mediation to Resolve the Disparate Impact Current Succession Law Has on Committed Same-Gender Loving Couples[1]

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I. INTRODUCTION

In recent years the national discussion concerning what rights same-gender loving Americans do or do not have has been thrust to the forefront of American political debate.[2] The issues of same-sex marriage, same-gender loving adoption rights, and civil unions have sparked heated debate between both ends of the political spectrum. Moreover, this particular national

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[1] The term "same-gender loving" will be used throughout this note as opposed to the term "gay" or the acronym LGBT. I chose to use this term because, as a same-gender loving male of the African Diaspora, I do not identify nor do I agree with the message or politics of the Euro-American "gay-rights movement." The term same-gender loving "is a description for homosexuals, particularly in urban African-American and Latino communities. It emerged in the early 1990s and is often used by those who prefer to distance themselves from terms that they see as associated with white-dominated lesbian, gay, and bisexual communities." Wikipedia, http://en.wikipedia.org/wiki/Same_gender_loving (last visited Feb. 20, 2008). The term includes both closeted and out homosexuals within the African-American and Latino communities. "It is also considered by some to be more descriptive of emotional links between gay men than the identity 'gay.'" *Id.*

[2] Many heterosexual Americans feel that issues relating to same-gender loving Americans have no bearing on their lives. However, same-gender loving issues do indeed affect the lives of many Americans. In fact, a 2006 Harris Interactive on-line study recently found that seven out of ten heterosexual Americans know someone who is same-gender loving. *See* Gay.com, *Survey: 7 of 10 Americans know someone gay*, http://www.gay.com/news/article.html?2006/10/10/2 (last visited Feb. 20, 2008).

discussion has led to the creation of some peculiar political bedfellows.[3] Such a marked focus on the rights of same-gender loving Americans is odd, at best, considering that prior to McCarthyism,[4] same-gender loving Americans were barely visible on the American cultural radar.[5] So the fact that the nation has become polarized over the issue of what rights same-gender loving Americans are entitled to is shocking. Regardless of where one may stand in the national debate concerning the rights of same-gender loving Americans, one thing still remains painfully clear: same-gender loving couples lack true donative freedom[6] under current probate law.

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[3] A prime example of this would be the recent phenomena of the African-American Christian organizations and churches joining forces with the ultra-conservative right faction of the Republican Party after countless years of supporting the Democratic Party.

[4] Wikipedia, http://en.wikipedia.org/wiki/McCarthyism (last visited April 15, 2008).

> McCarthyism is the term describing a period of intense anti-Communist suspicion in the United States that lasted roughly from the late 1940s to the late 1950s. The term derives from U.S. Senator Joseph McCarthy, a Republican of Wisconsin. The period of McCarthyism is also referred to as the Second Red Scare, and coincided with a period of increased fears of Communist influence on American institutions and espionage by Soviet agents. During this time many thousands of Americans were accused of being Communists or sympathizers and became the subject of aggressive investigations and questioning before government or private-industry panels, committees, and agencies. The primary targets of such suspicions were government employees, those in the entertainment industry, educators, and union activists. Suspicions were often given credence despite inconclusive or questionable evidence, and the level of threat posed by a person's real or supposed leftist associations or beliefs was often greatly exaggerated. Many people suffered loss of employment, destruction of their careers, and even imprisonment. Most of these punishments came about through trial verdicts that would later be overturned, laws that would later be declared unconstitutional, dismissals for reasons that would be later declared illegal, or actionable or extra-legal procedures that would later come into general disrepute.

Id. See also generally ALBERT FRIED, MCCARTHYISM, THE GREAT AMERICAN RED SCARE: A DOCUMENTARY HISTORY (Oxford Univ. Press 1996).

[5] SHANNON GILREATH, SEXUAL POLITICS: THE GAY PERSON IN AMERICA TODAY 83 (Univ. of Akron Press 2006).

[6] The principle of "donative freedom" is essential to the law of testation and considered by many to be the cornerstone of the law of wills. Donative freedom includes the right to pass one's property, upon death, to whomever one chooses. Additionally, the principle of donative freedom keeps people economically engaged because it encourages them to keep their capital productive and preserve it as opposed to squandering all of their assets.

Many couples experience a great sense of relief once they have gone through the estate-planning process because they have jointly created a testamentary plan that will provide for the people whom they love and care for in their absence.[7] However, the lack of true testamentary freedom that committed same-gender loving couples experience does not allow them to fully enjoy the peace of mind that usually accompanies the establishment of an estate plan. The fact that same-gender loving couples cannot necessarily rely on an estate plan to achieve the desired distribution of their estates leaves them in a perpetual state of limbo.[8] Committed same-gender loving couples' reliance on an estate plan to accurately reflect a decedent's intent is problematic, because relatives of the decedent may successfully challenge a testamentary plan that leaves most or all of an estate to a same-sex partner.[9] The inability of committed same-gender loving couples to fully rely on their established estate plans rests primarily on their vulnerability to the doctrines of testamentary capacity, undue influence, and testamentary fraud.[10] These

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[7] *See generally* Ellen D.B. Riggle et al., *The Execution of Legal Documents by Sexual Minority Individuals*, 11 PSYCHOL. PUB. POL'Y & L. 138, 139 (2005) (asserting that the execution of a will is not a common occurrence; a national survey by FindLaw in 2002 found that 44.4% of Americans had wills).

[8] Christine A. Hammerle, Note, *Free Will to Will? A Case for the Recognition of Intestacy Rights for Survivors to Same-Sex Marriage or Civil Unions*, 104 MICH. L. REV. 1763, 1768 (2006).

[9] *Id.*

[10] E. Gary Spitko, *Judge Not: In Defense of Minority-Culture Arbitration*, 77 WASH. U. L.Q. 1065, 1075 (1999) [hereinafter Spitko, *Judge Not*]; *see also* E. Gary Spitko, *Gone But Not Conforming: Protecting The Abhorrent Testator From Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 278–279 (1999) [hereinafter Spitko, *Gone But Not Conforming*].

> [T]o ensure that the testator's purported will truly represents her dispositive preferences, the law prescribes that the testator must possess testamentary capacity and be free from undue influence and fraud at the time she executes her will. The test for testamentary capacity is not demanding: the testator must only be capable of understanding (1) what she owns, (2) which persons are the natural objects of her bounty, (3) the estate plan that she is drafting, and (4) how these first three elements relate to each other. The test for undue influence is easily stated although it is not so easily applied: A will is invalid if it is obtained through an influence which destroys the free agency of the testator and substitutes another's volition for his. Influence may be undue although it does not amount to physical coercion, but mere advice, persuasion or kindness does not constitute undue influence. Finally, testamentary fraud has five elements: (1) a misrepresentation told (2) with the intent to deceive the testator and (3) with the intent to influence the will, which misrepresentation (4) does deceive the testator and (5) does influence the will.

doctrines are sufficiently nebulous to give wide breadth to a trier of fact who is intent on disregarding testamentary plans that offend the majoritarian norm that favors dispositions to blood relations.[11]

This Note argues that mediation may help solve potential testamentary planning issues facing same-gender loving couples. Mediation can be invaluable in this particular area because: (1) mediation can be used to create a plan of action and enforcement of donative wishes contained in the testamentary plans of committed same-gender loving couples; and (2) mediation can be used to solve problems and issues that are likely to arise between the surviving partner and surviving blood-relations, thus preserving the same-gender loving decedent's donative intent. Part II details the current law and its disparate effect on the donative wishes of committed same-gender loving couples. Part III details why mediation is a plausible solution for resolving the challenges that committed same-gender loving couples are likely to face when attempting to execute a legally valid testamentary plan. Part IV details how the current success mediation has enjoyed in the family law arena would prove beneficial to resolving probate disputes. Part V details how the current legal climate will give effect to mediation agreements that arise from the pre-death mediation process. Part VI offers a conclusion to this Note.

II. CURRENT FEDERAL AND PROBATE LAW DISPARATELY IMPACTS COMMITTED SAME-GENDER LOVING COUPLES

From the founding years of the republic through the nineteenth century, the intent of laws regulating sex was to strengthen the institution of marriage.[12] "They were not necessarily passed—at least not overtly—with the intention of subjugating the homosexual."[13] The Uniform Probate Code, the model American law governing the transfer of property at death, is no exception to the rule.[14] The most recent version of the Uniform Probate Code, hereinafter the UPC, contains several provisions that serve to

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Id. (footnotes omitted).

[11] *See* Spitko, *Judge Not*, *supra* note 10, at 1075.

[12] GILREATH, *supra* note 5, at 83.

[13] *Id.*

[14] The Uniform Probate Code was promulgated in 1969 and extensively revised in 1990. *See* E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1070–71 (1999).

effectuate the donative intent of the decedent.[15] However, the current version of the UPC fails to explicitly reference committed same-gender loving couples. Subsequently, the donative intent of these particular couples may not be afforded the same level of protection as their heterosexual counterparts.[16]

Current probate law is structured in such a way that probate disputes have the potential to impose majoritarian cultural norms on a decedent who has left an estate plan that deviates from the cultural norm that favors dispositions to a legal spouse or close blood relations over dispositions to "non-family."[17] Thus, a same-gender loving couple who has expended a great deal of time, money, and effort into creating an estate plan runs the risk that a court may invalidate their plan.[18] The challenges that current laws impose on same-gender loving couples, who are attempting to execute a legally valid testamentary plan, truly circumvent the deeply implanted American ideal of donative freedom. The following Sections describe the negative impact

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[15] *See, e.g.*, UNIF. PROBATE CODE § 2-506 (amended 1993) (choice of law provision intended to provide wide opportunity for validation of expectations of testators); UNIF. PROBATE CODE § 2-903 (allows for judicial reformation of a donative transfer that violates the statutory rule against perpetuities); UNIF. PROBATE CODE § 2-104 (noting that the requirement that the intestate heir survive the intestate decedent by 120 hours in order to take intestate share of the estate sometimes "prevents the property from passing to persons not desired by the decedent"); *see also* Mary Louise Fellows, *Traveling the Road of Probate Reform: Finding a Way to Your Will (A Response to Professor Ascher)*, 77 MINN. L. REV. 659, 666 (1993) ("For the UPC, the issue is how best can the state further the testator's *unattested* intent in light of a contingency event that the testator failed to contemplate when executing her or his will.").

[16] Spitko, *supra* note 14, at 1066.

[17] *Id.* at 1064–65. When one views a committed same-gender loving relationship through the majoritarian cultural lens, a surviving same-gender loving partner will always be considered "non-family." So being that a non-family label will always attach, it is fair, according to the view of the majoritarian sexual culture, to exclude or prohibit dispositions to same-gender loving partners. A surviving same-gender loving partner will never be able to escape the majoritarian sexual culture label of "non-family" despite the fact that they, undoubtedly, shared deep emotional and affectional ties with the decedent.

[18] *See generally* Spitko, *Gone But Not Conforming*, *supra* note 10, at 281–82. Invalidation of a same-gender loving couple's estate plan is more likely to occur when the estate plan offends the fact-finder's own cultural norms. Thus, a challenge by a blood relation becomes a conflict over deeply-held values. American society highly values testamentary freedom but is wary of endorsing personal relationships that deviate from the norm. These two values come into conflict when a fact-finder equates upholding a non-traditional testamentary gift with endorsing the non-traditional relationship that influenced the gift.

current laws, namely Article II of the UPC and the Defense of Marriage Act, have on the committed same-gender loving couples.

A. *Article II of the 1990 Uniform Probate Code's Negative Impact on Committed Same-Gender Loving Couples*

The estate plans of same-gender loving couples are extremely susceptible to challenges by blood relations in part because of Article II of the 1990 UPC.[19] Article II "provides the law of intestate succession as well as substantive rules covering the execution and revocation of wills and certain other non-probate instruments."[20] Under existing probate law, once a trier of fact has declared the decedent's estate plan invalid, the decedent's probate property is distributed according to an intestate distribution scheme that favors blood relations and wholly excludes the surviving same-gender loving partner.[21] Article II's exclusion of the surviving same-gender loving partner from the intestate succession hierarchy, as well as the forced division of property according to blood relations, disparately affects same-gender loving couples.

Article II's negative impact on committed same-gender loving couples is not surprising when one considers that the development of succession law focused on the traditional nuclear family.[22] Yet, in the wake of the sexual revolution the traditional nuclear family is no longer the norm; succession law has failed to keep pace with the changing nature of the American family.[23] By failing to include a surviving same-gender loving partner in the

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[19] *See* Spitko, *supra* note 14, at 1075.

[20] *Id.* at 1066.

[21] Spitko, *Gone But Not Conforming*, *supra* note 10, at 280–81; *see also* Riggle et al., *supra* note 7, at 141. A typical intestate succession statute establishes some sort of blood-relation hierarchal order (e.g., spouse, children of majority age, parents, grandparents, aunts, uncles, cousins, and other relatives further removed).

[22] Spitko, *supra* note 14, at 1094; *see also* Hammerle, *supra* note 8, at 1779.

[23] *See* Spitko, *supra* note 14, at 1096; *see also* T.P. Gallanis, *Inheritance Rights For Domestic Partners*, 79 TUL. L. REV. 55, 59 (2004). The 2000 Census has provided us with additional demographic information about the number of unmarried opposite-sex and same-sex couples. According to the Census Bureau, there are 105,480,101 households in America. Of these, 59,969,000, or 56.9%, are headed by partners, whether married or unmarried. Of the households headed by partners, 5,475,768, or 9.1%, are headed by unmarried partners. Of these, 594,391, or 10.9%, are headed by same-sex partners, while 4,881,377, or 89.1%, are headed by partners of the opposite sex. The households headed by same-sex partners, while more numerous in certain parts of the nation than in others, exist in all fifty states and in 99.3% of all counties. *Id.*

intestate succession hierarchy, the UPC ignores an important distinction between the lives of same-gender loving people and the lives of heterosexuals. It goes without saying that same-gender loving men and women differ from heterosexuals "with respect to their core romantic and affectional preferences."[24] Subsequently, it is highly likely that they will also differ with respect to their donative preferences—meaning that many committed same-gender loving couples do not wish to be bound by the typical intestate succession hierarchy.[25]

The hierarchal order[26] that is established by a typical intestacy statute is inconsistent with the donative preferences of many same-gender loving Americans.[27] A recent study by Mary Louise Fellows highlights the differences in donative preferences between same-gender loving and heterosexual Americans.[28] When Fellows presented same-gender loving respondents in committed relationships with a hypothetical in which a same-gender loving decedent was survived by their partner and siblings, 68.7% would leave the *entire* estate to their partner.[29] Furthermore, when presented with a hypothetical that that had a same-gender loving decedent survived by his or her partner and child under the age of eighteen, Fellows extrapolates that nearly 98.5% of same-gender loving respondents would leave the partner at least one-half of the estate.[30] The Fellows study overwhelmingly demonstrates that same-gender loving Americans in committed relationships want to provide for their partners in the event that they should pass away. Moreover, the Fellows study reinforces that the prevailing intestacy scheme, which excludes the surviving same-gender loving partner, does not adequately represent the donative preferences of same-gender loving Americans.

In addition to the Fellows study, "there has long been anecdotal evidence that [same-gender loving men and women] in committed same-sex relationships generally do not prefer the prevailing intestacy scheme."[31] For example, same-gender loving men and women have attempted to adopt their partners as their children, despite the drawbacks of this option, in an effort to

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[24] Spitko, *supra* note 14, at 1064.

[25] *Id.*

[26] *See supra* note 21 and accompanying text.

[27] *See infra* note 28 and accompanying text.

[28] For further discussion of the Fellows Study, see Spitko, *supra* note 14, at 1073.

[29] *Id.* (emphasis added).

[30] *Id.*

[31] *Id.* at 1071.

comport with the current intestate succession scheme, which favors children over ancestors in intestate succession.[32] In sum, the combination of the Fellows study and the anecdotal evidence begs the conclusion that committed same-gender loving men and women who are in committed relationships favor an intestate distribution scheme that provides for their surviving partners.

The failure of Article II to recognize the fundamental difference between same-gender loving people and heterosexuals undermines the primary value of the 1990 version of the UPC—promoting donative freedom.[33] This forced division of property according to blood relations fails to take into account that many same-gender loving Americans become estranged from their families once they "come out" of the proverbial closet.[34] Thus, the UPC's

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[32] *Id.* By adopting a partner, that partner legally becomes the testator's child and the estate will pass to the adopted partner as opposed to the testator's blood relations—"children" take under intestate succession before siblings and parents. So this option is usually chosen to prevent unjust enrichment of blood relations under the intestate succession scheme. This option is risky because the adoption is permanent and cannot be undone, thus if the relationship terminates the adopted ex-partner still has a right to inherit. The drawbacks of adult adoption may be eliminated in states that allow adults to designate an heir. This particular designation is legally binding but lacks the permanency of adult adoption. Thus, if a committed same-gender loving couple should part ways the designation can be removed, causing all successorship rights to be terminated. For an example of a statute that allows adults to designate an heir, *see* Ohio Probate Code § 2105.15.

[33] Spitko, *supra* note 14, at 1104.

[34] *See* Riggle et al., *supra* note 7, at 142 ("BGLT individuals, however, may be estranged from their relatives for a variety of reasons, including actual or anticipated rejection of the BGLT individual by their family of origin when they 'come out.'"); *cf.* Jeff Beeler & Vicky DiProva, *Family Adjustment Following Disclosure of Homosexuality by a Member: Themes Discerned in Narrative Accounts*, 25 J. ON MARITAL & FAM. THERAPY 443, 433 (1999).

> Gay men and lesbians are popularly viewed as being disconnected from their family of origin and without families of their own. Media representations often exclude gay men and lesbians from the family, and coming out is often portrayed as a rejection of family. Even among scholarly works, the family of origin is most commonly viewed either as a source of rejection and homophobia or irrelevant in the day-to-day life of gay and lesbian people. Coming out to family can, indeed, lead to rejection, estrangement, and maltreatment. Adolescents are particularly vulnerable to adverse events following disclosure, including physical violence, sexual abuse, extrusion from the home, and being forced into treatment to "cure" their homosexuality. Such responses occur often enough to represent a significant social problem; nevertheless, *estrangement from family is the exception rather than the rule.*

presumption that there was a healthy and supportive relationship between the decedent and his or her family can be problematic because it has the potential to unjustly enrich estranged family members at the expense of the surviving same-gender loving partner.[35]

The disparate treatment that same-gender loving couples experience under Article II's current intestate succession scheme devalues committed same-gender loving couples and their relationships.[36] However, Article II's silence regarding the relationships of same-gender loving couples has not negatively impacted the formation of committed same-gender loving partnerships.[37] In fact, a recent study calculated that there are approximately 3.4 million Americans in committed same-gender loving partnerships.[38] Thus, the failure of the 1990 version of the UPC to recognize the intestacy rights of same-gender loving Americans is not likely to deter same-sex relationships—it is wholly ineffective in forcing people to conform to the majoritarian ideal of moral sexual relationships.[39] Article II's absence of intestacy inheritance for a surviving same-gender loving partner is a "sterile vindication" of current marriage laws and the traditional family structure, often at great human expense to a person whose romantic and material preferences do not substantiate the cookie-cutter image perpetuated by the law.[40] Obviously succession reform could remedy this disparate treatment, yet it is highly unlikely that any such reform will be occurring in the near future.[41]

Id (citations omitted) (emphasis added).

[35] *See also* Spitko, *supra* note 14, at 1092–95 (stating that the public policy concern for the financial security and fair treatment of spouses and children, and the belief that most property owners probably intend to provide for their spouses and lineal descendants, creates a presumption in favor of the family); *see generally* Riggle et al., *supra* note 7, at 142.

[36] Spitko, *supra* note 14, at 1064.

[37] *See* Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 15 (1998).

[38] Spitko, *supra* note 14, at 1071.

[39] Hammerle, *supra* note 8, at 1778–79.

[40] *Id.* at 1779.

[41] *See generally id.* at 1773.

B. *The Defense of Marriage Act's Negative Impact on the Testamentary Rights Afforded to Same Sex Couples Through Civil Unions*

States provide a great variety of legal benefits to same-gender loving couples. In response to the national debate regarding same-sex marriage, a handful of states have chosen to allow same-gender loving couples to enter into "civil unions."[42] Civil unions are in some ways a "happy medium" because they confer many, if not all, of the rights associated with marriage to same-gender loving couples without actually labeling the union a marriage.[43] Thus, a surviving same-gender loving partner has the potential to be afforded all the protections of a "spouse" when it comes to the enforcement of a valid estate plan or intestate succession.[44] However, same-gender loving couples may find these testamentary rights severely compromised if they are attempting to enforce them in a jurisdiction other than the one in which their civil union occurred.[45]

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[42] Vermont and New Jersey currently have laws that permit same-gender loving Americans to enter into civil unions, and California recognizes domestic partnerships. Lambda Legal, http://www.lambdalegal.com (follow "In Your State" hyperlink; then follow hyperlink for each particular state) (last visited Sept. 24, 2007).

[43] It is arguable that civil unions allow both ends of the political spectrum to get what they want—civil unions allow same-gender loving Americans to receive some, if not all, of the benefits of marriage, while acquiescing to the political right's contention that the label of "marriage" should only apply to a union between a man and a woman. Furthermore, civil unions could possibly lay the foundation for widespread acceptance of "same-sex marriage" in the future.

[44] *See generally* Derek B. Dorn, *Same-Sex Marriage Under New York Law: Advising Clients in a State of Uncertainty*, 78 N.Y. ST. B.J. 40, 41 (Jan. 2006). All civil union statutes do not analogize same-gender loving partners to "spouses." For instance, Vermont extends to civil union partners all the same benefits, protections, and responsibilities under the law that are granted to a "spouse" in a marriage. In contrast, the Connecticut civil union statute does not define the parties to civil unions as "spouses." It is arguable that this slight variation in definition could affect intestate succession rights, but such an outcome is not likely. *Id.*

[45] *See* Spitko, *supra* note 14, at 1065.

> [A typical] intestacy law generally does not favor a decedent's surviving non-marital partner, whether that partner is of the same sex as the decedent or not. In all but two states, the surviving non-marital partner will not share in the decedent's estate as an intestate heir. Only in Hawaii and New Hampshire may the surviving non-marital partner take a portion of the decedent's intestate estate under certain circumstances.

Id.

Despite evidence of public support for civil unions[46] there is widespread state and federal public policy disfavoring civil unions.[47] This public policy hinges on the federal government's refusal to afford committed same-gender loving couples the same protections granted to heterosexuals through the Defense of Marriage Act, hereinafter DOMA.[48] This Act is a huge roadblock in providing full testamentary freedom for same-gender loving couples. DOMA contains harmful provisions that ultimately affect the transferability and validity of same-gender loving couples' testamentary plans:[49] (1) DOMA prevents any state from being required to recognize a same sex-marriage or

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[46] *See* Gallanis, *supra* note 23, at 57. A Gallup poll released in 2003 raised the question of permitting civil unions, which would give same-sex couples some of the rights of marriage. On this question, Americans were then evenly split: 49% in favor, 49% opposed, with 2% undecided. Between 2001 and 2003, support for civil unions had been increasing—44% in May 2001, 46% in May 2002, and 49% in May 2003. Subsequent polls, however, have shown considerable volatility in public opinion, the results often depending on whether the poll was taken shortly after a newsworthy event for domestic partnerships.

> [After the] United States Supreme Court's decision in *Lawrence v. Texas* [in July 2003], a Gallup poll found that opposition to civil unions had risen to 57%. Similarly, in December 2003, after the decision of the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*, a poll taken by the New York Times and CBS News found that support for civil unions had declined to 39%. Yet in March 2004, by which time the public had acclimatized to these judicial rulings, a Washington Post-ABC News poll found that support for civil unions with the same rights as marriage had climbed back to 51%.

Id.

[47] Hammerle, *supra* note 8, at 1772.

[48] *Id.* DOMA was enacted during the Clinton Administration, and it interprets the Full Faith and Credit Clause to contain an exception to the requirement of recognizing and giving effect to the public acts performed in other states that offend the notions of the state's public policy—this affront to public policy is all that is required to disregard validly entered-into marriages or their equivalent by same-gender loving individuals.

[49] *See* Gallanis, *supra* note 23, at 70.

its equivalent performed in another state;[50] and (2) DOMA creates a federal definition of marriage.[51]

Even though a small number of states have chosen to acknowledge civil unions performed in other states, the fact still remains that DOMA's effect on the status of civil unions subjects committed same-gender loving couples to the same challenges that they are likely to experience under Article II.[52] By allowing states to refuse to recognize same-sex marriage or its equivalent, notwithstanding the requirements of the Full Faith and Credit Clause,[53] a

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[50] Pub. L. No. 104-199 § 2, 110 Stat. 2429 (1996) (codified at 28 U.S.C. § 1738(C)).

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Id.

[51] Pub. L. No. 104-199 § 3, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7).

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word marriage means only a legal union between one man and one woman as husband and wife, and the word spouse refers only to a person of the opposite sex who is a husband or a wife.

Id.

[52] *See generally* Gallanis, *supra* note 23, at 73–74.

> Two state attorneys general—Eliot Spitzer [Democrat] of New York and Patrick Lynch [Democrat] of Rhode Island—have issued opinions that their states will respect marriages performed in Massachusetts. Yet the trend is in the other direction. Since the *Goodridge* decision, [many] states have modified, have attempted to modify, or are attempting to modify their statutory law to prevent the recognition of same-sex marriages.

Id.

[53] 4 Am. Jur. 2d *Constitutional Law* § 975 (2006).

> The Full Faith and Credit Clause can be found in Article Four, Section One, of the United States Constitution. The overall purpose of this clause is to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in others, absent a showing of fraud, lack of due process, or lack of jurisdiction. In order for the over all purpose of this clause to be achieved each state is required to honor and respect the official acts and judgments of other states.
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> Merely misconstruing another state's law does not constitute a violation of the Full Faith and Credit Clause. In order for a state to violate the Full Faith and Credit Clause their action or actions must rise to the level of an out right contradiction of

committed same-gender loving couple that has established a legally valid estate plan is likely to fall victim to the current intestate succession scheme where the surviving same-gender loving partner will be deprived of jointly-earned wealth.[54] Moreover, the failure to acknowledge civil unions performed in other states places a huge financial burden on committed same-gender loving couples because they must seek legal counsel in order to ensure that their estate plans are valid and could possibly withstand challenge in *every* jurisdiction in which they chose to reside or jointly hold property.[55]

The negative public policy backlash against the formation of civil unions only highlights the fact that the few states that extend rights to committed same-gender loving couples stand in stark contrast to the lack of protections afforded at the federal level. American society is based on democratic values and the ultimate virtue of equality, thus "the diminution of the rights of any person or group [amounts to] a diminution of the rights of all other members of the American polity."[56] The current state of same-gender loving couples' testamentary rights is an affront to the very principles upon which this nation was founded. Both the refusal to expand current succession law as well as the negative effects of DOMA on the donative freedom of same-gender loving couples reinforces the argument that the government views committed same-gender loving couples as insignificant and unsuitable for recognition.[57] The inclusion of surviving same-gender loving partners into the current intestate succession scheme would preempt strike suits by estranged or disgruntled blood relations seeking to undermine the donative intent of family members in committed same-gender loving relationships that die fully testate.[58] Such inclusion will provide committed same-gender loving couples with the

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the clearly established state law that is at issue. Federal courts are required to honor the Full Faith and Credit Clause where it is applicable.

Id.

[54] *See generally* Hammerle, *supra* note 8, at 1772.

[55] Riggle et al., *supra* note 7, at 157 (emphasis added). Forcing testators to make sure that their testamentary plan can withstand challenges in multiple jurisdictions runs counter to the intent of the drafters of the 1990 Uniform Probate Code. The drafters placed a high value on multi-jurisdiction uniformity in succession law. Their hope was that widespread adoption of the Code would induce testators to rely on a single will and thus refrain from making new wills every time they changed domicile from one state to another. Spitko, *supra* note 14, at 1096–97.

[56] GILREATH, *supra* note 5, at 132.

[57] Spitko, *supra* note 14, at 1107.

[58] *Id.*

opportunity to live the life that most Americans want: a life with minimal intrusion by the government in personal affairs, and the security in knowing that social institutions will serve them equally and that the laws affecting them will be enforced fairly.[59]

III. SAME-GENDER LOVING COUPLES CAN USE MEDIATION AS A TOOL TO OVERCOME THE SHORTCOMINGS OF CURRENT SUCCESSION LAW

Much of American society is enthralled with the notion of preserving family values. However, when issues arise relating to the rights of same-gender loving Americans, America rejects the key underlying tenet of strong familial bonds—family looks out for family. The current system of intestate succession exemplifies the rejection of this underlying tenet because it provides very little, if any, protection for same-gender loving family members in committed relationships.[60] Moreover, the current system has the potential to lead to situations where there is some tension between surviving same-gender loving partners and blood relations.[61] It is admirable that the current system of intestate succession is trying to preserve and encourage the nuclear family, but there is a point where the balance should tip in favor of the intentions of the decedent—there is a certain point where the policy encouraging nuclear families does not apply.[62] Mediation is a valuable tool that could help resolve the tensions between law and reality, while ultimately aiding in the preservation of the decedent's donative intent.[63] The following Sections discuss why mediation is a plausible solution to resolving the challenges that committed same-gender loving couples face in attempting to execute an enforceable testamentary plan.

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[59] MICHAEL NAVA & ROBERT DAWIDOFF, CREATED EQUAL: WHY GAY RIGHTS MATTER TO AMERICA 139 (1994).

[60] *See* Part II of this Note.

[61] Riggle et al., *supra* note 7, at 142.

> Some relatives may tolerate, but not truly accept, a BGLT individual's chosen family. During times of crisis, a tolerant or even supportive family of origin may become non-supportive of the BGLT individual's choices or wishes. This withdrawal of support can surface when the relatives are in a position to exercise control over the BGLT individual's life (or assets).

Id.

[62] Spitko, *supra* note 14, at 1094.

[63] *See infra* Part III.C.

A. *What is Mediation?*

"Mediation is the most common [alternative dispute resolution] technique in use today."[64] Mediation is unlike any other alternative dispute resolution technique due to the fact that an objective third-party is used to aid the parties in reaching a mutually beneficial settlement.[65] Moreover, mediation is a voluntary process and neither side is required to accept a settlement. "The use of mediation in estate planning is still relatively new."[66] Nevertheless, the use of mediation in estate planning is likely to grow as testamentary litigation becomes more common and more costly.[67]

Mediation offers the parties benefits that are not typically available through the traditional system of adjudication.[68] One of the chief benefits of mediation is that it is a private proceeding.[69] The privacy that mediation affords participants is particularly beneficial in probate disputes because it allows participants to prevent the public disclosure of tumultuous family and private affairs.[70] Mediation also provides its participants with the opportunity

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[64] Ray D. Madoff, *Mediating Probate Disputes: A Study of Court Sponsored Programs*, 38 REAL PROP. PROB. & TR. J. 697, 700 (2004). Although the use of mediation is common, states have differed in the scope and breadth of implementing mediation programs. Paul Dayton Johnson, Jr., Note, *Confidentiality in Mediation: What Can Florida Glean From the Uniform Mediation Act?*, 30 FLA. ST. U. L. REV. 487, 488 (2003).

[65] Madoff, *supra* note 64, at 700. It bears noting that the alternative dispute resolution technique know as arbitration also uses an objective third person. However, the objective third person does not aid the parties in reaching a mutually beneficial agreement. Instead, the general role of the third party in arbitration is to decide which party was right or wrong and to assign an adequate award or penalty. For more information concerning arbitration, *see generally* 4 Am. Jur. 2d *Alternative Dispute Resolution* § 177 (2006).

[66] Roselyn L. Friedman & Erica E. Lord, *Using Mediation to Stem the Tide of Litigation in The Ocean of Family Wealth Transfers*, 59 DISP. RESOL. J., Nov. 2004–Jan. 2005, at 36, 37.

[67] This area of law is bound to grow exponentially as America's "baby-boomer" generation grows older. The lower estimate for attorney's fees involved in probate litigation range from $1,500 to $13,000. *See* California Estate Planning Practice Blog, http://blogs.tldlaw.com/estate_planning/2007/03/cost_of_probate.html (last visited Feb. 20, 2008).

[68] Friedman & Lord, *supra* note 66, at 38.

[69] *Id.*

[70] Privacy is important to closeted or discrete same-gender loving couples that fear being "outed" and who wish to avoid the potential ramifications of being discriminated against at work or within society in general. *See id.* On a broader scale, the private nature

to create their own agenda for discussion.[71] This autonomous agenda-setting allows participants in mediation to address a variety of issues, whether legal or non-legal in nature.[72] Mediation also affords participants the opportunity to decide what constitutes a satisfactory resolution.[73] Thus, participants in mediation often have a greater resolve to abide by the mediated agreement as opposed to a judgment imposed by the court.[74] An additional benefit of mediation is that it allows families to address the emotional aspects of the dispute that originally led to the strained family relationship.[75] This benefit is extremely important in the context of probate disputes.[76] Often, parties in a probate dispute are chiefly concerned with voicing their grievances and are less concerned about the actual estate distribution.[77] Moreover, strained relationships and a breakdown in family communication frequently prove to be the key barriers to resolving probate disputes.[78] Mediation, by providing a healthy forum where the underlying emotional issues can be discussed, is

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of mediation aids in forming the crucial legal element of mediation—confidentiality. Confidentiality is necessary in mediation because it facilitates the exchange of information between the parties. The creation of an environment where parties freely exchange information aids in the development of a consensual or mutually acceptable agreement. In sum, the private nature of mediation allows for a more candid exchange between the parties which in turn allows them to maximize the potential benefit of their agreement. *See generally* Ellen E. Deason, *Procedural Rules for Complimentary Systems of Litigation and Mediation—Worldwide*, 80 NOTRE DAME L. REV. 553, 563 (2005).

[71] Madoff, *supra* note 64, at 700.

[72] *Id.*

[73] Rebecca H. Hiers, *Navigating Mediation's Uncharted Waters*, 57 RUTGERS L. REV. 531, 556 (2005).

> A great deal of mediation's appeal, and a significant reason why parties often express . . . satisfaction with mediation, is that it empowers the parties to make their own decisions. In the adversarial setting, a stranger makes important decisions about the parties' futures. In mediation, the parties are assisted in making crucial decisions for themselves.

Id.

[74] *See* Friedman & Lord, *supra* note 66, at 37.

[75] Andrew Stimmel, Note, *Mediating Will Disputes: A Proposal to Add a Discretionary Mediation Clause to the Uniform Probate Code*, 18 OHIO ST. J. ON DISP. RESOL. 197, 209 (2002) (providing a discussion of other benefits to mediation that are not relevant to this Note).

[76] *Id.*

[77] *Id.*

[78] *Id.*

often sufficient to overcome these barriers.[79] Furthermore, use of this forum may repair, maintain, or improve ongoing familial relationships.[80]

Although mediation affords participants in a probate dispute many advantages that are not available through traditional adjudication, it also has its drawbacks. The primary drawback of mediation in probate disputes is that the mediation will not be an inquiry into what the "truth" is or what is "right."[81] By failing to address either of these questions, mediation may not provide parties with the same satisfaction that a judicial resolution would.[82]

The mediation process is, also, often hindered by an American public psychology that strongly identifies with the adversarial system; American society has a prevailing belief that anything less than a full trial on the merits lacks validity.[83] The public's predisposition toward the traditional adversarial system causes many individuals to view mediation as the judicial system's underhanded way of placing their particular dispute on the back burner.[84] Additionally this bias toward the traditional adversarial system creates a huge hurdle for mediators to overcome because parties often enter the process with the mentality that mediation is just one step in the system on the way to their "real day in court." [85] Mediation also suffers from a perceived pressure to settle, despite the fact that mediation does not require settlement.[86] This overriding pressure to settle may negate the benefits mediation has to offer because it can lead to hurried, ineffective settlement agreements.[87] If parties enter into a hurried agreement, they are less likely to carry out the terms of the agreement; parties are less likely to carry out agreements perceived as

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[79] *See id.*

[80] *Id.*

[81] Madoff, *supra* note 64, at 700. The quasi-judicial environment of arbitration is better suited for determinations of right and wrong. In an effort to avoid the high emotional and financial costs of litigation, mediation strives to promote settlement among conflicted parties that focus on their common interests. This focus on common interests helps the parties formulate win-win solutions, as opposed to the win-lose solutions commonly generated by litigation. *See generally* Stimmel, *supra* note 75, at 216.

[82] Madoff, *supra* note 64, at 700.

[83] Bill Ezzell, Note, *Inside the Minds of America's Family Law Courts: The Psychology of Mediation Versus Litigation in Domestic Disputes*, 25 LAW & PSYCHOL. REV. 119, 133 (2001).

[84] *Id.*

[85] *Id.*

[86] *Id.* at 135.

[87] *Id.*

expeditious rather than wise.[88] The perceived pressure to settle a dispute increases the likelihood of future litigation over a previously settled dispute.

Mediation, like most legal processes, has both its positives and negatives; hence it can never fully guarantee a complete and satisfactory resolution to a probate dispute. However, what it does guarantee is an environment that forces the parties involved to think outside of the box and work toward a resolution that will preserve the donative intent of the decedent.[89] It is for this reason that mediation is a valuable tool in creating true donative freedom for committed same-gender loving couples.

B. *Same-Gender Loving Americans Are More Likely to Take Advantage of Mediation*

Traditional forums of litigation often present same-gender loving Americans with the dilemma of having to choose between foregoing the formal enforcement of their legal rights or trusting the enforcement of their rights to a biased forum.[90] However, mediation has provided many same-gender loving Americans with an opportunity to avoid this classic Catch-22.

Mediation provides same-gender loving Americans who have been either unwilling or unable to access the traditional court systems a forum in which to solve their disputes, particularly family disputes.[91] In fact, same-gender loving rights organizations, such as the Gay and Lesbian Advocates and Defenders (GLAD), encourage same-gender loving Americans to pursue mediation as a means of resolving family disputes.[92] Furthermore, committed same-gender loving couples have been using mediation since the 1970s to aid in the dissolution of committed relationships.[93] Mediation has permitted committed same-gender loving couples to institute a high level of control over their disputes and has empowered them to create outcomes that are

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[88] *Id.*

[89] Friedman & Lord, *supra* note 66, at 38.

[90] Mark J. Hanson, *Moving Forward Together: The LGBT Community and the Family Mediation Field*, 6 PEPP. DISP. RESOL. L.J. 295, 300 (2006).

[91] *Id.*

[92] *Id.*

[93] *Id.* It also bears noting that there are many instances of same-gender loving partners who have opted out of using mediation as a means to dissolve committed relationships and *have chosen to use the state's lack of recognition of their relationship as a weapon against their former partner. See id.*

conducive to their lifestyle.[94] Mediation has afforded same-gender loving couples the opportunity to have their disputes decided by the values of the greater same-gender loving community as opposed to the values imposed on them by the sexual majority.[95]

Using mediation as a tool to avoid the misconceptions and prejudices that are commonly associated with the same-gender loving community strengthens the overall same-gender loving community.[96] Mediation provides a means to avoid the reinforcement of negative or detrimental legal precedents that have the potential to hinder the same-gender loving rights movement.[97] By using mediation to usurp traditional litigation forums, committed same-gender loving couples can be spared both the current system's overt biases against them as well as the ramifications of the litigation process.[98]

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[94] *Id.* at 301.

[95] Hanson, *supra* note 90, at 301.

[96] *See also* William Mason Emnet, Note, *Queer Conflicts: Mediating Parenting Disputes Within the Gay Community*, 86 GEO. L.J. 433 (1997); *see generally* Hanson, *supra* note 90, at 302.

[97] *See* Hanson, *supra* note 90, at 302.

[98] For an example of the overt biases same-gender loving Americans face in the traditional judicial system, *see* Ex Parte H.H., 830 So. 2d 21, 26 (Ala. 2002) (stating that homosexual behavior "has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's God upon which this Nation and our [Alabama's] laws are predicated") (Moore, C.J., concurring). A same-gender loving litigant cannot assume that, in the relatively rare instance of there being present a same-gender loving judge or juror, will ensure empathy or respect for the values and rationale that informed the testator's estate plan. *See, e.g.*, TONI A.H. MCNARON, POISONED IVY: LESBIAN AND GAY ACADEMICS CONFRONTING HOMOPHOBIA (1997) (reporting numerous narratives of lesbian and gay academics who have experienced disparate treatment on the basis of their sexual orientation at the hands of closeted same-gender loving faculty, colleagues, and administrators).

C. *Pre-Death Mediation*[99] *is a Plausible Solution to Prevent the Usurpation of Committed Same-Gender Loving Couples' Donative Wishes*

When families incorporate mediation early in the estate planning process, it provides a safe forum for families to have an open discussion about what constitutes a fair distribution of a family's wealth.[100] This open forum makes pre-death mediation a plausible solution to preserving the donative wishes contained in the estate plans of committed same-gender loving couples.[101] Additionally, the mediation process often leads to the formation of creative solutions that are usually broader than the solutions available through the

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[99] The pre-death mediation process, at first glance, may appear to be similar to ante-mortem probate. However, the goal of the process is extremely different.

> Ante-mortem probate, also known as living probate, . . . allows the testator personally to educate the *fact-finder* with respect to the culture that informed her choice to devise her property as she did. Generally, ante-mortem probate is a mechanism for judicial determination during the testator's life of the validity of the testator's will. The principal advantage of ante-mortem probate is that it allows the court to consider the best evidence of the testator's capacity to execute a will, namely, the testator herself. Thus, ante-mortem probate affords the testator the opportunity to explain, in person, to the fact-finder why she devised her estate as she did and to refute personally any claims that her "unnatural" disposition of her property was the product of fraud, undue influence or a deficient mental capacity at the time she executed her will.

Spitko, *Gone But Not Conforming*, *supra* note 10, at 290 (emphasis added).

For additional discussion on ante-mortem probate, *see id.* at 278–79. Alternatively, pre-death mediation provides an opportunity for a testator to explain to their *blood relations*, not the fact-finder, the rationale for the dispositions in their testamentary document. The overall goal of pre-death mediation is to secure a binding promise from blood relations that they will not challenge the testamentary dispositions contained in the will of a same-gender loving family member in a committed relationship. Additionally, pre-death mediation provides an opportunity for reconciliation and possible acceptance of a same-gender loving family member's partner. All in all, the remedy and results implicit in pre-death mediation expand much further than the judicial remedy provided by the ante-mortem process.

[100] Friedman & Lord, *supra* note 66, at 37.

[101] "A family discussion and agreement about the distribution of an estate can help a testator of an estate decide on a distribution plan and can help the family as a whole by avoiding upsetting surprises at death." Donna R. Bashaw, *Are In Terrorem Clauses No Longer Terrifying? If So, Can You Avoid Post-Death Litigation With Pre-Death Procedures?*, 2 NAT'L ACAD. OF ELDER L. ATT'YS. 349, 357 (2006).

formal litigation process.[102] The plausibility and viability of using pre-death mediation to preserve the donative intent of committed same-gender loving couples increases when families form creative solutions.[103] Creative solutions are especially valuable in resolving family disputes where the parties have emotional ties and non-financial matters that are just as important, if not more important, than financial matters.[104]

Pre-death mediation can also help same-gender loving couples explain to their respective blood relations the rationale behind wishes contained in their estate plans.[105] The opportunity to explain the rationale behind the devises in the estate plan is essential to the preservation of donative intent.[106] This explanation process provides the same-gender loving testator with an opportunity to personally refute any claims that the dispositions in the estate plan were the product of fraud, undue influence, or a deficient mental capacity at the time the estate plan was formulated.[107] This lessens the ability of blood-relations to use the doctrines of fraud, undue influence, or deficient mental capacity to possibly challenge the committed same-gender loving couple's estate plan.[108]

Pre-death mediation can also lead to the acknowledgement and possible acceptance of a same-gender loving partner by respective blood relations, which could ultimately diminish the possibility that blood relations will challenge a committed same-gender loving couple's testamentary plan.[109] In short, "mediation has the power to bring parties to a different level of understanding about their underlying situation and about each other, to reestablish family harmony, and to resolve both monetary and relationship issues that probate matters generally involve."[110]

Pre-death mediation lays the foundation for same-gender loving couples to experience true donative freedom. Pre-death mediation can potentially

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[102] Friedman & Lord, *supra* note 66, at 38.

[103] *See generally id.*

[104] Bashaw, *supra* note 101, at 357. Keep in mind that any creative solution may be quashed because the advantaged party may be unwilling to give up advantages that the law grants them. *See id.*

[105] *See generally* Spitko, *Gone But Not Conforming*, *supra* note 10, at 290.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *See* Riggle et al., *supra* note 7, at 144.

[110] Lela Porter Love, *Mediation of Probate Matters: Leaving a Valuable Legacy*, 1 PEPP. DISP. RESOL. L.J. 255, 256 (2001).

allow committed same-gender loving couples the opportunity to develop and adopt a law of succession that is apart from the majoritarian legal system.[111] Thus, pre-death mediation provides same-gender loving couples with an opportunity to avoid current succession laws that will be applied to them if a biased or unsympathetic fact-finder invalidates their respective estate plans. In short, pre-death mediation will allow same-gender loving couples to experience true donative freedom because they will be free to structure their lives in accordance with rules that were drafted with the realities of their lifestyle[112] in mind.[113] The attitudes and opinions expressed by blood relations during pre-death mediation would grant same-gender loving couples a considerable amount of self-determination about whether or not they should actually enter into or legally cement their prospective testamentary plan, maintain separate and individual estates, or try a different avenue of asset consolidation and maintenance.[114]

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[111] *See generally* Spitko, *supra* note 14, at 1063.

[112] A substantial portion of same-gender loving Americans are likely to take issue with characterization of homosexuality as a "life style" choice. *See Web Poll: Is it a Choice or Are You Born Gay?*, CLIK, July 15, 2007, at 10. In fact many would argue that they had no choice in the matter and that they were born same-gender loving. *Id.* This sentiment is echoed in a recent web poll conducted by America's number one black gay lifestyle magazine where 82% of respondents felt they were born gay as opposed to a mere 18% of respondents who felt they chose or learned to be gay. *Id.* The comments of one web poll respondent summarize the sentiments of many same-gender loving Americans:

> It does not matter what is said in debate, the fact of the matter is that you can not tell me that at the age of [six], I chose to be gay[.] It's not that cut and dry[.] I'm not ashamed that I am gay, but if I had a choice believe me I would have chosen to be straight, that's a fact. Everyone can debate it until the cows come home, but you are born gay, it's not a chosen behavior.

Id.

[113] Spitko, *Judge Not*, *supra* note 10, at 1082.

[114] *See* Patricia A. Cain, *A Review Essay: Tax and Financial Planning for Same-Sex Couples: Recommended Reading*, 8 LAW & SEXUALITY 613, 620 (1998) (failing to merge assets can be detrimental to same-gender loving relationships. For same-gender loving couples, promises of commitment and responsibility may be an empty gestures in the absence of retitling assets or the execution of a contract. Reluctance to merge assets is sometimes viewed by one partner as an indication that the other partner is less committed). For a discussion on additional methods of financial planning for same-gender loving couples, see generally Walter D. Schwidetzky, *Last-Gap Estate Planning: The Formation of Family Limited Liability Entities Shortly Before Death*, 21 VA. TAX REV. 1 (2001); Matthew R. Dubois, Note, *Legal Planning for Gay, Lesbian, and Non-Traditional Elders*, 63 ALB. L. REV. 263 (1999).

The potential benefits of pre-death mediation are not limited to same-gender loving couples. The committed same-gender loving couples who attempt to circumvent the current succession laws that ill serve the realities of their lives may inadvertently spur on succession law reform by providing a model for comparison.[115] The agreements reached in pre-death mediations may expose how the laws formed to benefit the sexual majority fail to serve the needs of sexual minorities.[116] Therefore, agreements that same-gender loving couples and their respective blood relations formulate in mediation to fit their particular needs can serve as the focus of efforts to reform current succession laws.

Pre-death mediation has the potential to serve as a safe haven for committed same-gender loving couples who are bound to experience disparate effects under current succession laws. This particular type of mediation has the potential not to only resolve familial disputes that could arise during the enforcement of a committed same-gender loving couple's estate plan, but also heal and restore family bonds that may have been destroyed once a same-gender loving family member decided to "come out" of the proverbial closet.[117] Each time same-gender loving couples use mediation to subvert the current succession laws, they have the opportunity to expose the disparate impact that those laws have on same-gender loving Americans.[118] Moreover, if pre-death mediations were to become routine, it is possible that the general public would acclimate to the idea that customized succession is both practical and useful.[119] Such acclimation could potentially lessen the resistance to political reforms that are specifically tailored to sexual minorities.[120]

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[115] *See* Spitko, supra note 14, at 1083.

[116] Sexual minorities include both same-gender loving couples as well as heterosexual couples that chose to deviate from the typical nuclear family structure.

[117] *See supra* Part III.A.

[118] *See* Spitko, *supra* note 14, at 1083.

[119] *Id.*

[120] *See id.*

D. *Same-Gender Loving Couples Can Use Coerced Voluntary Compliance*[121] *to Ensure that Their Blood Relations Take Part in Pre-Death Mediation*

In order for committed same-gender loving couples to receive all the benefits associated with pre-death mediation, they must ensure that the blood relations who are named in the will and those who could possibly challenge the will participate in the process. Mediation will not be successful unless the affected parties show up and take part.[122] In order to ensure participation in the pre-death mediation, same-gender loving couples can include a provision in their wills stating that the estate plan will be subject to pre-death mediation and any person who fails to take part in the process, but nevertheless chooses to contest the will by litigating the validity of the instrument, shall forfeit a devise under the will.[123] In order for this "mediate-or-else clause" to work, the same-gender loving testator must ensure that devises to blood relations are significant enough to discourage challenges.[124] So, a potential drawback to this type of clause is that a will contestant to whom the same-gender loving testator has devised little or no property loses little or nothing under the mediate-or-else clause by challenging the will.[125] However, there is a possibility that this disadvantage may be mitigated if prospective challengers realize that their actions may be jeopardizing the devises to other close blood relations; in that case, it is arguable that they will not be likely to pursue such a course of action.

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[121] Implicit in the idea of applying the technique of coerced voluntary compliance or participation to mediation is the notion that the compelling party will cover all of the costs associated with the mediation. Thus, the compelled party has further incentive to participate in the mediation because they will not be paying any money out of pocket—all that is really required of them is to show up and participate in good faith.

[122] Same-gender loving couples who plan to use coerced voluntary compliance need to keep in mind that many state legislatures have failed to clearly define what constitutes satisfactory participation. In order to address this problem a few states have defined the necessary level of participation in terms of a "good faith" standard. Alternatively, some commentators have suggested a "meaningful participation" standard or an objective standard. *See* Tracy J. Simmons, Note, *Mandatory Mediation: A Better Way to Address Status Offenses*, 21 OHIO ST. J. ON DISP. RESOL. 1043, 1064 (2006).

[123] *See generally* Spitko, *Gone But Not Conforming*, *supra* note 10, at 297–98.

[124] *Id.*

[125] *Id.*

This mediate-or-else clause, in essence, would function in the same manner as a "no-contest clause"[126] in a testamentary instrument.[127] A no-contest clause is a technique used by lawyers to discourage litigation over a decedent's estate.[128] A no-contest clause deters costly litigation and helps ensure that the decedent's wishes are honored and that his or her reputation is not harmed when no longer alive to provide a defense.[129] A no-contest clause typically presents a potential contestant with two options. A contestant can either: (1) accept the gift under the will, or (2) contest the validity of the instrument with the hope of upsetting the testator's intended disposition, and instead attempt to receive a greater share of property through intestacy, either under a prior will or via some other means.[130] Thus, the no-contest clause in essence places a condition on a gift.[131] When contestants choose to go with

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[126] This is also known as a "terrorem clause," implying that terror was supposed to be struck in the hearts of anyone who might challenge the testamentary instrument. There is currently a trend for these types of clauses to be named "forfeiture clauses," focusing on the fact that beneficiaries will forfeit their bequest if they contest the will. *See generally* Bashaw, *supra* note 101, at 351. The following is an example of a typical boilerplate no-contest clause:

> If any devisee or beneficiary under my will or under any trust established under my will shall in any way, directly or indirectly, initiate or participate in any contest, challenge, or attack to the validity of my will or any of its provisions, or object to or contest its admission to probate, or conspire with or give aid to any person doing or attempting any of the foregoing, then in each case all provisions for such beneficiary and his or her descendants herein shall be void and my estate shall be disposed of in the same manner provided herein as if such person had predeceased me leaving no descendants surviving me.

David M. Swank, *No-Contest Clauses: Issues for Drafting and Litigating*, 29 COLO. LAW. 57, 59 (2000).

[127] Spitko, *Gone But Not Conforming*, *supra* note 10, at 298.

[128] A "no-contest clause" can be useful in achieving clients' estate planning goals. However, practitioners should be as specific as possible in drafting documents containing no-contest clauses due to the tendency of the courts in jurisdictions that enforce these clauses to strictly construe them. *See* Bashaw, *supra* note 101, at 351. In order to give irrebuttable force to a no-contest clause, the clause should be very specific as to the beneficiaries that are bound by the clause, the grounds upon which the clause is triggered, the document being challenged that creates the contest, and the assets being forfeited as a result of an unsuccessful contest. *See id.* at 356.

[129] *Id.* at 357.

[130] Gerry W. Beyer et al., *The Fine Art of Intimidating Disgruntled Beneficiaries With* In Terrorem *Clauses*, 51 SMU L. REV. 225, 227 (1998).

[131] *See* Thomas C. Taylor, Jr., *Pour-Over Wills: Drafting For Testamentary Additions to Trusts*, 15 PROB. & PROP., Jan.–Feb. 2001, at 15, 19.

the latter option, they run the risk of forfeiting their dispositions under the will if the contest fails.[132] Yet, if their contest successfully obstructs the administration of the testator's will, the no-contest clause will be disregarded because the entire testamentary instrument is considered null and void.[133] Conversely, if the contestant fails to prove that the will is invalid, the no-contest clause is applied, and the contestant will no longer be entitled to the devise.[134]

Although the no-contest clause is a powerful tool in securing the donative intent of the decedent, it is subject to limitations. The major limitation of a no-contest clause is that courts in a majority of states will not enforce such clauses when the contestant has raised its challenge in good faith and with probable cause.[135] The rationale behind this limitation is that when a contestant can establish both probable cause and good faith there is a public interest in allowing the disposition to be challenged; to uphold a testamentary disposition under these circumstances would amount to a contravention of public policy.[136] So, the emerging rule pertaining to the enforcement of no-contest clauses is if there is a good-faith belief and probable cause to believe the no-contest clause is not valid, then the clause is not enforceable.

Although no-contest clauses are subject to this significant limitation, it is not likely that the good faith and probable cause standards will be met in cases dealing with the disposition of a same-gender loving decedent's estate.[137] Both of these standards are not likely to be met in this specific context because the vast majority of blood-relation challenges to a committed

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[132] Beyer et al., *supra* note 130, at 225.

[133] *Id.* at 227.

[134] *Id.*

[135] *See* Bashaw, *supra* note 101, at 349; *see also* Spitko, *Gone But Not Conforming*, *supra* note 10, at 298. It also bears noting that this is the position taken by UNIF. PROBATE CODE § 3-905. Furthermore, there is a small number of states that outright refuse to enforce no-contest clauses.

[136] *See generally* Bashaw, *supra* note 101, at 349.

[137] A moral objection does not satisfy the good faith or probable cause standard because a challenge that is based on a mere moral objection will not satisfy the well established tests for undue influence, testamentary capacity, or testamentary fraud. *See supra* note 10 and accompanying text. Moreover, a mere moral objection is not proper grounds for invalidating a will provision or disposition despite the fact that the UPC does not specifically prohibit a court from invalidating a will provision on a basis of public policy. This can be said because allowing a moral objection to a will disposition or provision to be considered adequate grounds for reversal or invalidation will create a dangerous slippery slope that will drastically increase probate litigation.

same-gender loving decedent's testamentary plan will be based on moral objections to the decedent's chosen lifestyle.[138] Mere moral objections to a person's lifestyle are not sufficient to satisfy either the good faith or probable cause standard.[139] Furthermore, honoring a challenge that is based merely on a moral objection stands in total opposition to the well-entrenched legal doctrine of donative freedom.

A court that chooses not to enforce a no-contest provision is in essence violating the superior right of the testator. The testator's right to dispose of property as he or she sees fit is indisputably superior to the moral objections or rights of an intestate beneficiary to receive the testator's property via testamentary instrument.[140] The testator's rights are superior because he or she owns the property against which the intestate beneficiary rights are being asserted.[141] The fact that probate law allows the testator to defeat the expectations of heirs-apparent, as well as putative legatees, by transferring all of their property inter vivos provides strong support for the conclusion that the rights of the testator are far superior to the rights that any heirs-apparent or punitive legatees may possess.[142] The fact that a court would let a challenge steeped in moral objections disrupt the superior rights of the testator is an affront to American notions of justice.[143] The testator ought to be able to condition any distribution of property on compliance with reasonable directions respecting resolution of disputes over the estate.[144]

E. *The Success That Mediation Has Enjoyed in the Family Law Arena Further Displays That Pre-Death Mediation Can Be Beneficial to Resolving Probate Disputes*

The use of mediation in family law to resolve disputes has experienced tremendous growth in past decades.[145] This growth is not likely to slow down any time soon, due in part to the growing amount of education about alternative forms of dispute resolution; this growing amount of education has

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[138] *See supra* note 137.

[139] *Id.*

[140] Spitko, *Gone But Not Conforming*, *supra* note 10, at 299.

[141] *Id.*

[142] *Id.*

[143] *See supra* note 137 and accompanying text.

[144] Spitko, *Gone But Not Conforming*, *supra* note 10, at 298.

[145] Kathy A. Hunt, *Using Mediation in Family Law Cases*, WYO. LAW., Dec. 2004, at 32, 32.

helped many people realize that alternative forms of dispute resolution are less costly, both financially and emotionally, than traditional forms of litigation.[146] Moreover, "clients view mediation as a perfectly logical solution to the inappropriateness of asking the courts to become involved in resolving the private problems of America's families:[147] the courts are ill-equipped to truly resolve such problems."[148] The mere fact that mediation allows parties to take control of their own issues, provides flexibility, and creates avenues to address situations not covered by a particular statute make mediation an attractive solution.[149] Mediation, in essence, allows the court to distance itself from the emotional baggage that typically accompanies family disputes.[150]

The area of family law that has been most impacted by the court's distancing itself from the inherent emotional issues associated with family disputes is divorce litigation.[151] The impact of mediation on this particular area of family law is clear: the most recent developments in family law mediation have occurred in the area of divorce law and litigation.[152] Divorce mediation[153] has grown rapidly as a matter of necessity; the high rate of divorce in this country today has forced state court systems across the country to come up with ways to manage the rising caseload,[154] and

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[146] *Id.*

[147] *See* Susan W. Harrell, *The Mediation Experience of Family Law Attorneys*, 20 NOVA L. REV. 479, 480 (1995).

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *See generally* STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 466 (Aspen Publishers 4th ed. 2003).

[152] *Id.*

[153] The process and goals of divorce mediation are not dissimilar from any other form of mediation. The parties involved in divorce mediation meet with a neutral third party to resolve their dispute and negotiate the terms of their settlement/dissolution. The overall goals of the divorce mediation process include: "creating an equitable, legally sound and mutually acceptable divorce settlement; avoiding the expense and trauma that accompany litigation and minimizing hostility and post dissolution controversy." Daniel J. Guttman, Note, *For Better or Worse, Till ADR Do Us Part: Using Antenuptial Agreements to Compel Alternatives to Traditional Adversarial Litigation*, 12 OHIO ST. J. ON DISP. RESOL. 175, 181 (1996).

[154] Robert E. Emery et al., *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 23 (2005).

"although the majority of divorce actions are uncontested, state courts are [nevertheless] flooded with divorce petitions."[155]

There is a great multitude of advantages associated with divorce mediation. However, the key benefit of this type of mediation is that it eliminates the one spouse being portrayed as the "bad guy" during the course of the marriage and its dissolution.[156] By eliminating the "bad guy" element, divorce mediation decreases the probability that post-divorce litigation will occur.[157] Additional benefits of divorce mediation include: "a private venue for communication; reduced 'feelings of anger and injustice;' [and the] diminution of 'win or lose' and [the] 'right-or-wrong' mentality."[158] The many benefits associated with divorce mediation have prompted many states to

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> Divorce rates escalated rapidly in the United States beginning in the late 1960s, a trend that foreshadowed similar increases in other English-speaking countries and throughout most of the industrialized world. Since the early 1980s, divorce rates in the United States have flattened and even declined somewhat, yet the plateau reached is a high one. More than 40% of first marriages in the United States are still predicted to end in divorce. Not only does divorce remain frequent, but other demographic trends, particularly increased rates of non-marital childbearing and cohabitation (parenting arrangements that are known to be less stable than marriage), appear to account for much of the apparent decline in divorce. If people who cohabit and/or have children outside of marriage had not "selected out" of marriage, there would be little or no decline in American divorce.

Id. (citations omitted).

[155] Guttman, *supra* note 153, at 175.

[156] Yelena Ayrapetova, *HB 004: Mandatory Divorce Mediation Program Passed in Utah*, 7 J. L. & FAM. STUD. 417, 418 (2005); *see also* Robert E. Emery, *Divorce Mediation: Negotiating Agreements and Renegotiating Relationships*, 44 FAM. REL.: HELPING CONTEMP. FAM. 377, 379 (1995) (addressing the similarities between mediation and family therapy).

[157] Ayrapetova, *supra* note 156, at 418; *see also* Emery, *supra* note 156, at 380 (addressing the efficiency of mediation in yielding positive settlement agreements in divorce settlements).

[158] Ayrapetova, *supra* note 156, at 418.

> Although the benefits of divorce mediation abound it is not free from controversy. The opponents to divorce mediation argue that divorce mediation should not be used because: it is hard for mediators to remain neutral during divorce mediations; the mediators that are used are more likely than not to be non-lawyers thus they are unfamiliar with the law; non-lawyer mediators are not bound by the same ethical guidelines as lawyers; and divorce mediations are harmful to women, especially those attempting to escape relationships that are plagued by domestic violence.

Id. at 419.

embrace it.[159] Currently divorce mediation is the most popular alternative to divorce litigation and is actively "encouraged in most jurisdictions either by law or by judge."[160] The success that mediation has enjoyed in family law, especially in the area of marriage dissolution, strongly reinforces the notion that mediation is a plausible and cost-effective alternative to traditional litigation of family law disputes.[161] More importantly, the positive effects and outcomes resulting from divorce mediation suggest that mediation can be effective in highly volatile and emotional settings.

It is for these reasons that mediation has the potential to help committed same-gender loving couples preserve the donative intent that underlies their testamentary dispositions. Probate disputes at their very core are family disputes that contain many, if not all or more, of the emotional ups and downs that are present in divorce cases.[162] Furthermore, the great emotional arc that is associated with divorce mediation is extremely likely to be present in pre-death mediation concerning the disposition of a family member's estate who is involved in a committed same-gender loving relationship. Thus, the extreme emotional similarity increases the likelihood that committed same-gender loving couples that incorporate pre-death mediation into their testamentary plan will experience many of the positive benefits associated with divorce mediation. Furthermore, the pre-death mediation process will provide courts with the same opportunity to avoid entangling themselves into family disputes that they are ill suited to handle or fully appreciate.[163] It also bears noting that the more the use of mediation in the family law arena grows and proves itself to be beneficial, the greater the probability that the family member who will be called to participate in the mediation would have already been exposed to the mediation process. Greater exposure to the mediation process increases familiarity with the process, and as familiarity

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[159] *See generally id.*

[160] *Id.* (stating that divorce mediation's popularity has caused some states to statutorily mandate that contested divorces be deferred to mediation prior to litigation—litigation is only pursued if the divorce mediation fails to yield a settlement). Requiring parties to enter into mandatory divorce mediation has proved successful in many jurisdictions because it yields higher settlement rates. *Id.* Moreover, parties in divorce mediation tend to reach settlements in half the time it would take them in a traditional adversarial setting. *Id.*

[161] *Id.*

[162] Ray D. Madoff, *Lurking in the Shadow: The Unseen Hand of Doctrine in Dispute Resolution*, 76 S. CAL. L. REV. 161, 164 (2002); *see also* Stimmel, *supra* note 75, at 197; Love, *supra* note 110, at 255.

[163] *See* Harrell, *supra* note 147, at 480.

increases so too does the willingness to actively participate, engage in active dialogue, and form creative solutions to family disputes.

IV. THE CURRENT LEGAL CLIMATE INDICATES THE COURTS WILL GIVE EFFECT TO MEDIATION AGREEMENTS THAT ARISE FROM THE PRE-MEDIATION PROCESS

The success that mediation has enjoyed in the family law arena has led many proponents of mediation to advocate applying it to other areas of the law.[164] In fact, mediation proponents have been advocating that the use of mediation be expanded to probate disputes for years.[165] However, the opponents to mediation have been very vocal and active in voicing their arguments and concerns about such an expansion. The arguments that opponents raise have not fallen on deaf ears. Apprehension concerning the use of mediation in probate disputes can be seen in jurisdictions with well-developed mediation programs.[166] Opponents to such expansion chiefly argue that the inherently emotionally charged nature of probate disputes makes them unsuitable candidates for mediation.[167] Proponents of mediation find this argument against using mediation as a tool in settling probate disputes unsatisfactory.[168] Proponents argue that while it is true that probate disputes are highly charged, many family law disputes that are ultimately resolved through mediation involve similar levels of malice.[169] Additionally, it is arguable that when the opponent's chief argument is applied to the context of pre-death mediation, it loses considerable power because the amount and type of emotion involved in a pre-death mediation will be considerably less when compared to a mediation concerning a traditional probate matter.[170] The amount of emotion involved in a pre-death mediation is considerably less because the focus is not on siblings quibbling over who gets their mother's antique lamp or their dad's ranch; rather, the focus is on understanding how a same-gender loving family member's lifestyle choice has guided testamentary dispositions.[171] So while emotion may play some

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164 *See generally id.* at 479.

165 *See generally* Stimmel, *supra* note 75, at 197.

166 Madoff, *supra* note 162, at 164.

167 *Id.*

168 *Id.*

169 *Id.*

170 *See generally* Stimmel, *supra* note 75, at 208–09.

171 *Id.*

role in the limited adoption of mediation in resolving probate disputes, it cannot provide a complete explanation for why it should not be adopted as a tool in resolving such disputes.[172]

The tension between both sides of the debate has slowed the expansion and acceptance of mediation as a tool to assist courts in resolving probate disputes.[173] The existence of this tension may lead one to assume that the court may not give any legal effect to pre-death mediation agreements. Yet, nothing could be further from the truth. The current legal climate indicates that courts will give effect to mediation agreements that are the result of the pre-death mediation process.[174]

A. *Courts Favor Family Settlement of Probate Issues*

Probate courts' adherence to the "family settlement doctrine" indicates that they are likely to give effect to mediation agreements that arise from pre-death mediation processes.[175] The family settlement doctrine encourages families to settle probate disputes among themselves where there is a reasonable or substantial basis for believing that prolonged or expensive litigation[176] will result from the distribution of the estate according to the decedent's testamentary plan.[177] When courts apply this doctrine, they will generally enforce the settlement agreement that the family creates as long as there are no signs of fraud, undue influence, or breach of confidential relationship.[178] The fact that the agreement reached by the family was produced through negotiation or mediation is of little or no consequence to the court in determining whether or not to give the agreement effect.[179] The

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[172] Madoff, *supra* note 162, at 164.

[173] *Id.*

[174] *See infra* Parts V.A & V.B.

[175] Stimmel, *supra* note 75, at 219. "The family settlement doctrine is based on the notion that the property devised by will is vested immediately in the beneficiaries, who may then do with it as they please." *Id.*

[176] The doctrine is also encouraged when the estate will be depleted or family relationships will be completely eviscerated.

[177] Stimmel, *supra* note 75, at 219.

[178] *Id.*

[179] *Id.* The UPC makes no mention of what method may be used to arrive at such agreements; that decision is left presumably to the local probate court or the parties themselves. UNIF. PROBATE CODE § 3-912.

overall effect of this doctrine is that it prevents dockets from being crowded with familial probate disputes that can be reconciled.[180]

The pre-death mediation process and the mediation agreements that are likely to result from such a process are in complete compliance with the family settlement doctrine. The purpose of the pre-death mediation process is to provide an opportunity to prevent litigation between a surviving same-gender loving partner and the family of the same-gender loving decedent.[181] Thus, its purpose is in total congruence with the family settlement doctrine.[182] Furthermore, the pre-death mediation process goes a step further than the family settlement doctrine because it provides the drafter of the estate plan with a "voice at the table."[183] The fact that the drafter has a voice at the mediation table would further strengthen or support a court's decision to give effect to a mediation agreement that results from a pre-death mediation.[184] Moreover, the drafter's participation provides powerful evidence that the agreement reflects his or her donative intent.

B. *Courts are Implementing Uniform Standards that Mediation Agreements Must Follow in Order to be Enforceable*

Judges highly favor agreements that arise from mediation due to the fact that they conserve judicial resources and help decrease overcrowded dockets.[185] Mediation agreements carry with them a presumption of validity and enforceability.[186] Being that this presumption attaches to mediated agreements, parties who argue that mediated "agreement[s] should not be enforced have an uphill battle."[187]

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[180] Stimmel, *supra* note 75, at 219.

[181] *See supra* Parts III.A, III.C.

[182] *See generally* Stimmel, *supra* note 75, at 217–19.

[183] *See* Spitko, *Gone But Not Conforming*, *supra* note 10, at 286–90.

[184] *See id.*

[185] Peter N. Thompson, *Enforcing Rights Generated in Court Connected Mediation—Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 523 (2004).

[186] *Id.*

[187] *Id.*

Although it is well-settled that mediation agreements are enforceable,[188] there is great debate over what type of mediated agreements are worthy of enforcement.[189] For instance, in some states oral mediation agreements are enforceable, while in other states, in order for a mediation agreement to be enforced it must be in writing.[190] The debate over what type of mediation agreements are enforceable has many facets, but the key arguments center on the prevention of allegations of fraud or duress and the need to form a written record that can be entered into evidence should litigation occur.[191] Despite the ambiguity that exists concerning what type of mediation agreements are worthy of enforcement, the current trend leans toward the conclusion that mediation agreements must be written and executed—signed by the participants—in order to be enforceable.[192]

Requiring mediation agreements to be preserved in a written document has been well-taken due to the fact that the mediation process has particular attributes that give the writing requirement extreme significance.[193] For instance, the creation of a written document involves clarifying and cautionary functions that are essential to the mediation process.[194] A significant function of the writing requirement is that it helps the parties involved in mediation realize that although the mediation process itself is rather informal, the end result is, in and of itself, very important.[195] Additionally, a written document helps preserve the consensual nature of the

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[188] The ways in which mediation agreements are enforced varies from state to state. For instance, some states provide specific statutory enforcement of mediation agreements, while other states leave enforcement to the law of contracts. While a majority of states have rules relating to mediation in their codes of civil procedure, others choose to expand rules governing mediation statutorily. *See* Johnson, *supra* note 64, at 488.

[189] *See generally* Thompson, *supra* note 185, at 516–19.

[190] *Id.*

[191] *See generally* Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides With Confidentiality*, 35 U.C. DAVIS L. REV. 35, 77 (2001); James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 80–84 (2006).

[192] Hiers, *supra* note 73, at 553–57.

[193] *See generally* Deason, *supra* note 191, at 77; Coben & Thompson, *supra* note 191, at 73.

[194] Deason, *supra* note 191, at 77.

[195] *Id.*

mediation by reinforcing to the parties that the agreement they reached was a product of their own autonomous decisions.[196]

On first blush, it would appear that the mediation agreements that are the result of pre-death mediations would not conform to the current trend's requirement that the agreement be "executed." However, execution in this sense does not mean that the parties have to fully perform the promises they made during the mediation.[197] Execution in this sense simply means that the parties to the mediation sign the mediation agreement.[198] By signing the mediation agreement the parties basically agree to be bound by the terms of the agreement.[199] In the words of Professor Ellen E. Deason, "signing a writing is a simple formality that most people understand as a binding act."[200] Moreover, requiring that a mediation agreement be signed acts as "a cautionary signal that a settlement should not be entered into lightly or without [a] thorough consideration of the consequences and alternatives."[201]

The mediation agreements that would result from the pre-death mediation between committed same-gender loving couples and their blood relations will conform with the current trend of requirements for a binding mediation agreement. The main objective of committed same-gender loving couples who would initiate a pre-death mediation is to secure written and legally enforceable promises from their blood relations that they will not challenge the dispositions contained in their testamentary plan.[202] So, with that objective in mind, if an agreement is reached it is unlikely that same-gender loving couples would allow the mediation to close without a signed written record of the promises or concessions that resulted from the mediation.[203] Furthermore, since the mediation agreement would have to be included in the testamentary plan, current probate law dictates that it be in writing and signed by the parties involved in the mediation.[204]

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196 *Id.*

197 UNIF. MEDIATION ACT § 2(9)(A) (1999).

198 *Id.*

199 *See generally* UNIF. MEDIATION ACT; Deason, *supra* note 191, at 77.

200 Deason, *supra* note 191, at 77.

201 *Id.*

202 *See supra* Part III.C.

203 *Id.*

204 The Uniform Probate Code endorses resolution of will contests through alternative dispute resolution. *See* UNIF. PROBATE CODE § 3-912 (amended 1993) (requiring the personal representative to abide by the terms of an agreement reached by the successors to the estate with respect to "alter[ing] the interests, shares, or amounts to

If a party to the pre-death mediation should choose to challenge the dispositions contained in the same-gender loving decedent's testamentary plan, the written and signed mediation agreement provides the surviving same-gender loving partner with a powerful piece of evidence to dispute such a challenge.[205] Additionally, the fact that the surviving same-gender loving partner has a mediation agreement signed by the contestant creates a strong possibility that the testamentary challenge will be dismissed.[206] The UPC contains provisions regarding the enforceability of separate agreements

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which they are entitled under the will of the decedent, or under the laws of intestacy, in any way that they provide in a written contract executed by all who are affected by its provisions").

> A compromise of any controversy as to admission to probate of any instrument offered for formal probate as the will of a decedent, the construction, validity, or effect of any [governing instrument], the rights or interests in the estate of the decedent, of any successor, or the administration of the estate, if approved in a formal proceeding in the Court for that purpose, is binding on all the parties thereto including those unborn, unascertained or who could not be located.

UNIF. PROBATE CODE § 3-1101; UNIF. PROBATE CODE § 3-1102 (providing that a court may approve a will contest settlement agreement if, after notice to all interested persons, the court "finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable").

[205] The mediation agreement will have to be in writing so the Uniform Mediation Act's privilege provision will not apply, thus allowing mediation communication to be entered into evidence if the need should arise. *See* UNIF. MEDIATION ACT § 2(2) ("'[m]ediation communication' means a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing or reconvening a mediation or retaining a mediator."); UNIF. MEDIATION ACT § 4(a) ("[e]xcept as otherwise provided . . . a mediation communication is privileged . . . and is not subject to discovery or admissible in evidence in a proceeding."); UNIF. MEDIATION ACT § 6(a)(1) ("There is no privilege under Section 4 for a mediation communication that is in an agreement evidenced by a record signed by all parties to the agreement.").

Additionally, evidence of a fully executed mediation agreement is powerful because it begs the question: "Why would the challenging blood relation sign the pre-death mediation agreement if they thought the dispositions contained in the testamentary plan were the product of fraud, duress, or lack of capacity?" The act of signing an agreement that they did not fully agree with or had some fundamental objections to raises considerable question about the challenging blood relation's character. *See generally* Hindmarch v. Angell, 60 P.2d 434, 435 (Cal. 1936).

[206] *See* Stimmel, *supra* note 75, at 219.

among beneficiaries.[207] Beneficiaries that enter into agreements that alter the shares, interests, or amounts they would receive either through a will or intestacy are bound by that agreement.[208]

V. CONCLUSION

The law that governs the implementation and application of estate plans in the United States, on its face, does not hamper the rights of individuals to dispose of their property as they see fit upon their death.[209] However, if one looks beneath the surface, it is clear that laws currently in place blindly cling to the notion of the American nuclear family.[210] Thus, these laws, in essence, fail to address that a vast majority of Americans have to make personal decisions on the basis of economic, psychological, and sexual realities that cause them to reinvent the typical family structure.[211]

The real world application of the current law exposes the inherent disparate effects committed same-gender loving couples experience.[212] For example, it is arguable that a same-gender loving female who leaves all of her property to her partner stands on equal footing with a husband who leaves all of his property to his wife.[213] Yet, nothing could be further from the truth because if surviving blood relations challenged either of these devises it is far more likely that the former devise would be struck down when compared to the latter.[214] So, the idea that current probate and succession laws provide all Americans with testamentary freedom and are designed to effectuate testamentary intent is a myth.[215] Americans only have the right to distribute and or assign their property according to a well

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[207] Deason, *supra* note 191, at 77; *see generally* Coben & Thompson, *supra* note 191, at 73.

[208] *See* UNIF. PROBATE CODE § 3-912; *see also* UNIF. PROBATE CODE § 3-1102 (stating that settlement agreements of will contests can also be submitted to the court for approval, in which case they become binding not only on the parties to the agreement, but also on those unborn, unascertained, and who are unable to be located).

[209] UNIF. PROBATE CODE § 3-1102.

[210] Spitko, *supra* note 14, at 1094.

[211] NAVA & DAWIDOFF, *supra* note 59, at 139.

[212] *See supra* Part II.

[213] Spitko, *supra* note 14, at 1063.

[214] *Id.*

[215] *Id.*

delineated format set forth by the sexual majority.[216] This disparate effect will continue until the current succession laws are changed, but such change is unlikely to occur in the near future being that the socio-political power and influence of the conservative right is growing exponentially in this country today. However, the concept of pre-death mediation will allow committed same-gender loving couples an opportunity to overcome the norms of the sexual majority and condition succession to their property on terms that conform to their sexual reality.

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[216] *See generally* Spitko, *Gone But Not Conforming*, *supra* note 10, at 275.